



2184

PATENT  
3667-0102P  
#518  
2/18/04

## IN THE U.S. PATENT AND TRADEMARK OFFICE

Applicant: Simon QIN Conf.: 6544  
Appl. No.: 09/750,160 Group: 2184  
Filed: December 29, 2000 Examiner: M. Le  
For: BACKUP/RECOVERY SYSTEM AND METHODS  
FOR PROTECTING A COMPUTER SYSTEM

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FEB 19 2004

Technology Center 2100

**RESPONSE TO NOTICE OF NON-COMPLIANT AMENDMENT**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

February 17, 2004

Sir:

Applicant has received a Notice of Non-Compliant Amendment dated January 30, 2004. This Notice indicates that the claims in the Amendment dated January 5, 2004 have improper status identifiers. Applicant is submitting herewith a new amended claim set with the proper identifiers to make this Amendment compliant. This claim set is identical to the one submitted on January 5, 2004, except that the identifier "Amended" has been changed "Currently Amended." In view of this, Applicant submits that the Amendment of January 5, 2004 is now in compliance with Rule 121 and that an action on the merits is now appropriate.

Appln. No. 09/750,160  
Reply to Notice of 01/30/2004

Reply dated February 17, 2004  
Page 2 of 8

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fee required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By: Joe McKinney Muncy  
Joe McKinney Muncy  
Reg. No. 32,334

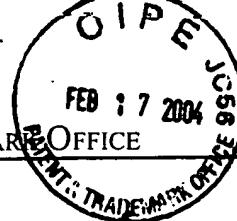
KM/RFG/gf  
(703) 205-8000  
3667-0102P

P.O. Box 747  
Falls Church, Virginia 22040-07047

Attachment: Amendments to the Claims (revised)



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/750,160	12/29/2000	Simon Qin	3667-0102P	6544
7590	01/30/2004			EXAMINER
BIRCH, STEWART, KOLASCH & BIRCH, LLP			LE, DIEU MINH T	
P.O. Box 747			ART UNIT	PAPER NUMBER
Falls Church, VA 22040-0747			2114	

DATE MAILED: 01/30/2004

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Response  
3-29-04

Please find below and/or attached an Office communication concerning this application or proceeding.

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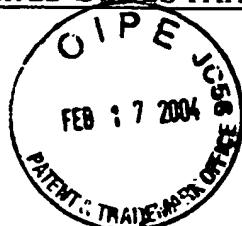
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# UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE  
WASHINGTON, DC 20233  
www.uspto.gov



Paper No. \_\_\_\_\_

## Notice of Non-Compliant Amendment (37 CFR 1.121)

The amendment document filed on 01/05/04 is considered non-compliant because it has failed to meet the requirements of 37 CFR 1.121, as amended on June 30, 2003 (see 68 Fed. Reg. 38611, Jun. 30, 2003). In order for the amendment document to be compliant, correction of the following omission(s) or provision is required. **Only the section (1.121(h)) of the amendment document containing the omission or non-compliant provision must be resubmitted (in its entirety), e.g., the entire "Amendments to the claims" section of applicant's amendment document must be re-submitted.**

THE FOLLOWING CHECKED (X) ELEMENTS(S) CAUSE THE AMENDMENT DOCUMENT TO BE NON-COMPLIANT:

1. Amendments to the specification:  
 A. Amended paragraph(s) do not include markings.  
 B. New paragraph(s) should not be underlined.  
 C. Other \_\_\_\_\_

2. Abstract:  
 A. Not presented on a separate sheet. 37 CFR 1.72.  
 B. Other \_\_\_\_\_

3. Amendments to the drawings: \_\_\_\_\_

4. Amendments to the claims:  
 A. A complete listing of all of the claims is not present.  
 B. The listing of claims does not include the text of all claims (incl. withdrawn claims)  
 C. Each claim has not been provided with the proper status identifier, and as such, the individual status of each claim cannot be identified.  
 D. The claims of this amendment paper have not been presented in ascending numerical order.  
 E. Other: \_\_\_\_\_

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FEB 19 2004

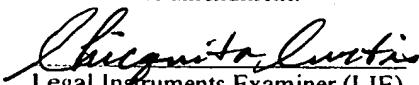
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For further explanation of the amendment format required by 37 CFR 1.121, see MPEP Sec. 714 and the USPTO website at <http://www.uspto.gov/web/offices/pac/dapp/ropa/preognitice/officenewer.pdf>.

If the non-compliant amendment is a **PRELIMINARY AMENDMENT**, applicant is given ONE MONTH from the mail date of this letter to supply the corrected section which complies with 37 CFR 1.121. Failure to comply with 37 CFR 1.121 will result in non-entry of the preliminary amendment and examination on the merits will commence without consideration of the proposed changes in the preliminary amendment(s). This notice is not an action under 35 U.S.C. 132, and this **ONE MONTH** time limit is not extendable.

If the non-compliant amendment is a reply to a **NON-FINAL OFFICE ACTION**, and since the amendment appears to be a *bona fide* attempt to be a reply (37 CFR 1.135(c)), applicant is given a TIME PERIOD of ONE MONTH from the mailing of this notice within which to re-submit the corrected section which complies with 37 CFR 1.121 in order to avoid abandonment. **EXTENSIONS OF THIS TIME PERIOD ARE AVAILABLE UNDER 37 CFR 1.136(a).**

If the amendment is a reply to a **FINAL REJECTION**, this form may be an attachment to an Advisory Action. **The period for response to a final rejection continues to run from the date set in the final rejection**, and is not affected by the non-compliant status of the amendment.

  
Legal Instruments Examiner (LIE)

### **III. DISCUSSION**

#### **A. Legal Standard.**

It is well established that “[t]o state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” West v. Atkins, 487 U.S. 42, 48 (1988) (citations omitted); see also Biliski v. Harborth, 55 F.3d 160, 162 (5th Cir. 1995) (per curiam). An action may be dismissed for failure to state a claim when it is clear that the prisoner can prove no set of facts in support of his claim entitling him to relief. Oliver v. Scott, 276 F.3d 736, 740 (5th Cir. 2002) (citation omitted). The complaint must be liberally construed in favor of the prisoner, and the truth of all pleaded facts must be assumed. Id. (citation omitted).

#### **B. Plaintiff Failed To Exhaust His Administrative Remedies.**

The Prison Litigation Reform Act provides:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The exhaustion requirement applies to *all* inmate suits about prison life, whether involving general circumstances or specific incidents. Porter v. Nussle, 534 U.S. 516, 524 (2002); Clifford v. Gibbs, 298 F.3d 328, 330 (5th Cir. 2002). Moreover, a prisoner is required to exhaust his administrative remedies even if damages are unavailable through the grievance process. Booth v. Churner, 532 U.S. 731, 741 & n.6 (2001); Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001). The exhaustion requirement is not jurisdictional. Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (per curiam). Dismissal without prejudice is appropriate where the exhaustion requirement has not been met. See *id.* at 296. A prisoner must complete the administrative review process in accordance with all procedural rules, including deadlines, as a precondition to bringing suit in federal court. Woodford v. Ngo, \_\_\_ U.S. \_\_, 126 S. Ct. 2378, 2382, 2387 (2006).

The Bureau of Prisons (“BOP”) provides a three-tiered administrative process by which inmates can present a complaint. 28 C.F.R. § 542.10 *et. seq.* First, the inmate must present the complaint informally on a Form BP-8 to a staff member at the facility where he is housed. 28 C.F.R. § 542.13(a). If this informal procedure does not resolve the issue, the inmate then commences the three-tiered administrative remedy procedure by filing a formal written complaint on a Form BP-9 with the warden at the local level. 28 C.F.R. § 542.14. If unsatisfied with

the warden's response, the inmate may submit an appeal on Form BP-10 within twenty days of the response to the regional director. 28 C.F.R. § 542.15. If unsatisfied at the regional level, then the inmate has thirty days from the date of the regional director's response to submit an appeal on Form BP-11 to the general counsel. Id. The appeal to the General Counsel is the final administrative appeal provided by the BOP.

At the hearing, plaintiff admitted that he did not pursue his claims to the regional level or to the general counsel. Specifically, he failed to file either a BP-10 or a BP-11. As such, plaintiff has failed to exhaust properly his administrative remedies. Accordingly, it is respectfully recommended that his claims be dismissed for failure to exhaust.

### **C. Plaintiff Failed To State A Claim Regarding Any Interest In A Job.**

In addition to failing to exhaust properly his administrative remedies, plaintiff's complaint fails to raise cognizable constitutional claims, such that this action is dismissed properly for failing to state a claim.

The BOP created the Inmate Financial Responsibility Program ("IFRP") to assist inmates in "meet[ing] his or her legitimate financial obligations." 28 C.F.R. § 545.10. With few exceptions, the IFRP applies to all inmates in federal facilities. Id. The failure to comply with the IFRP often results in the loss of prison

privileges and incentives, including parole, furloughs, performance or vacation pay, outside work details, UNICOR work privileges, special purchase entitlement, community based programs, and loss of housing status whereby the inmate will be quartered in the lowest status prison housing. 28 C.F.R. § 545.11(d).

In this case, plaintiff was required to pay \$25.00 quarterly toward restitution. The month prior to his payment, he had spent \$21.00 such that he was unable to pay his FRP. Because he did not pay his fine, he was placed on refuse status and lost certain privileges. Specifically, he testified that after being placed on “refuse status,” he had less desirable housing and was removed for eligibility for a UNICOR job. Although a failure to comply with an IFRP payment plan may result in the loss of prison privileges and incentives, such losses do not impose a significant restraint on the prisoner’s liberty so as to invoke the due process clause. See Sandin v. Conner, 515 U.S. 472, 484 (1995) (due process protections do not attach to every change in an inmate’s confinement, but only those that pose a significant or atypical hardship on the inmate in relation to the ordinary incidents of prison life).

Moreover, the Supreme Court has explained that prisoner classification and eligibility for rehabilitation programs in federal prisons are not directly subject to due process protections. Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976).

Furthermore, prisoners have no constitutionally protected liberty or property interest *per se* in their prison job assignments. Jackson v. Cain, 864 F.2d 1235, 1250 (5th Cir. 1989); accord Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 49 (5th Cir. 1995). In fact, even if plaintiff *had* a UNICOR job and lost it, he would not have a constitutional claim. See Bulger, 65 F.3d at 50 (joining with Third and Seventh circuits to hold that a federal prisoner has no property interest in UNICOR job assignment).

Plaintiff's allegations fail to state a claim upon which relief can be granted, and it is respectfully recommended that they be dismissed.

**D. Plaintiff Cannot Bring His Civil Rights Claim Against UNICOR Or FCI-Three Rivers.**

Plaintiff names FCI-Three Rivers and UNICOR as defendants in this action. However, plaintiff can obtain no relief under Bivens against a federal agency. FDIC v. Meyer, 510 U.S. 471, 484-86 (1994) (unanimously holding that a Bivens action cannot be brought against a federal agency); Moore v. U.S. Dep't of Agric., 55 F.3d 991, 995 (5th Cir. 1995) (recognizing Bivens is not extended to suits against federal agencies). Because plaintiff cannot obtain relief against FCI-Three Rivers or UNICOR in a Bivens action, his claims against these defendants lack an arguable basis in law, and are thus legally frivolous. See Neitzke v Williams, 490

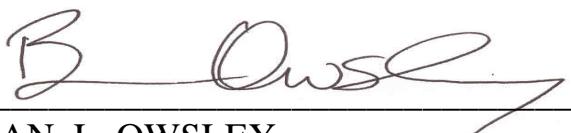
U.S. 319, 327 (1989). Therefore, it is respectfully recommended that these claims be dismissed with prejudice.

#### **IV. RECOMMENDATION**

For the foregoing reasons, it is respectfully recommended that plaintiff's claims be dismissed for failure to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e. Moreover, it is respectfully recommended that plaintiff's claims against all defendants be dismissed for failure to state a claim and as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b)(1).

Finally, it is respectfully recommended that, should the Court adopt this recommendation, that dismissal be one as described by 28 U.S.C. § 1915(g), and that a copy of this recommendation and the order of dismissal be sent to: **District Clerk for the Eastern District of Texas, Tyler Division, 211 West Ferguson, Tyler Texas, 75702, Attention: Betty Parker.**

Respectfully submitted this 6th day of April 2007.



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BRIAN L. OWSLEY  
UNITED STATES MAGISTRATE JUDGE

**NOTICE TO PARTIES**

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **TEN (10) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(C); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within TEN (10) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).